April 29, 2013

Former Employee

Re: Post State Employment Restrictions
AGO File No.: AN2010100308

Dear Former Employee:

This letter responds to your April 18, 2013 email request for advice regarding the parameters and restrictions on your future employment or contract work after you leave state service on April 30. You currently serve as a division director in a state executive branch department. You indicate that you are familiar with the Executive Branch Ethics Act, AS 39.52, and have taught an ethics class for many years in which you have reviewed the restrictions on employment after state service. At this time, you do not have a specific assignment, contract, or employment opportunity in mind and therefore this letter provides only general guidance.

As you know, there are several provisions of the Ethics Act that apply to former state employees. We discuss them below.

I. TWO-YEAR BAR ON WORK ON THE SAME MATTER

Alaska Statute 39.52.180(a) imposes a two-year prohibition on certain post-state employment. For two years after leaving state service, a former state officer may not "represent, advise, or assist a person for compensation regarding a matter that was under consideration by the administrative unit served by that public officer, and in which the officer participated personally and substantially through the exercise of official action." The Department of Law has consistently read this prohibition in accord with the legislature's intent that AS 39.52.180 be narrowly applied.[1] Thus, paragraph 180(a)

[1] 1997 Inf. Op. Att'y Gen. at 3 (Apr. 30; 663-97-0328).

prohibits an activity during the two-year post-state employment period only if the activity meets each of the elements of that subsection. The goal is to protect the integrity of state actions but recognize that state employees gain expertise and knowledge on the job that they rightfully take with them when they leave state service.

The Ethics Act and related regulations define most of the terms used in AS 39.52.180(a).[2] That paragraph defines the term "matter" to include "a case, proceeding, application, contract, or determination, proposal or consideration of a legislative bill, a resolution, a constitutional amendment, or other legislative measure, or proposal, consideration, or adoption of an administrative regulation." In applying the provision, we focus on the relationship, if any, between matters you worked on while in state service and the matter you propose to work on after leaving state service.

Whether participation in a matter is "personal and substantial" depends on the circumstances of each case. Routine processing of documents, general supervision of employees without direct involvement in a matter, and ministerial functions not involving the merits of a matter do not constitute "personal and substantial" participation.[3] The term "official action" means "advice, participation, or assistance, including, for example, a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer."[4]

In an early interpretation of AS 39.52.180(a), we focused particularly on the terms "matter" and "exercise of official action." We concluded:

> That a "matter that was under consideration" and "the exercise of official action" refers to activities that either involve the discretionary exercise of sovereign power or the distribution of state property (through grants, contracts, sales, etc.). Those activities do not include a wide range of state-

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[2] For example, a "public officer" includes any public employee in the classified, partially exempt, or exempt service. AS 39.52.960(20), (21). A "person" includes a business. AS 39.52.960(17). "Compensation" means money or other economic benefit received in return for services rendered to another. AS 39.52.960(7). "Administrative unit" means "a branch, bureau, center, committee, division, fund, office, program, section, or any other subdivision of an agency." AS 39.52.960(1). "Agency" includes an executive branch department. AS 39.52.960(2).

[3] 9 AAC 52.100(b).

[4] AS 39.52.960(14).

> sponsored activity, including the hypothesized promotional activities designed to strengthen private enterprise in the state.[5]

In another early opinion, we said that, based on the legislative history, "matter" should be "narrowly circumscribed around the examples specifically listed" and concluded that general formulation of policy does not constitute a "matter" for purposes of post-state employment restrictions. We found that so long as policy discussions and decisions concerning the state's interest in the subject "did not coalesce into a particular and specific contract, case, application, determination, proceeding, or other similar action which involved determining the rights of third parties or the disposition of state property (including money), this person is not barred from dealing with future subjects or matters, even though they may be the outgrowth of those policy decisions."[6] Currently, "matter" does not include the general formulation of policy for purposes of post-state employment restrictions by administrative regulation.[7]

We ordinarily find that a former state employee's substantial participation in the preparation, approval, administration, etc. of a contract, permit, project or similar matter while in state service, bars the employee from working on that matter after state service. Generally, each procurement of a product or service addressed by the division and any related protest or appeal would be a "matter" for purposes of the post state employment restriction.

Alaska Statute 39.52.180(a) does not necessarily prohibit a former employee from working on a significant modification or extension to a project, even though the former employee may not work on the original matter.[8] If, for example, a contract expires, and is simply extended for an additional time period through increased funding, and the scope of work and other terms and conditions of the contract remain the same, the extension of the contract may be construed materially to be the same "matter" as the original contract. If, however, the contract is in whole or part modified to materially alter the scope of work, then, in the particular case, the modified part of the contract may be a new matter,

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5 1986 Inf. Op. Att'y Gen. (Sept. 24; 663-87-0109).

6 1986 Inf. Op. Att'y Gen. at 2-3 (Nov. 13; 663-87-0203).

7 9 AAC 52.100(a).

8 2000 *Inf. Op. Att'y Gen.* (Dec. 13; 663-01-0104); 2000 WL 34246954 (Alaska A.G. 2000).

and the former employee may be able to work on the modified portion of the contract, even though the former employee may not work on the original contract.[9]

In order to assess the application of AS 39.52.180(a), we need to understand the nature of your work while in state service and how it may relate to an assignment for a new employer. The specific circumstances are essential to our review of the propriety of matters under the Ethics Act.

Finally, if a post-state employment activity satisfies all of the elements for being prohibited, there are two exceptions to this prohibition. First, a state agency may contract with a former public officer to act on a matter on behalf of the state.[10] Second, the head of the agency may waive the prohibition if he or she determines in writing that the former public officer's representation is "not adverse to the public interest" and the waiver is approved by the attorney general.[11]

II. ONE-YEAR BAR ON LOBBYING

We understand that the position you have held as a senior manager is the functional equivalent of a division director in the department. Under AS 39.52.180(d), former public officers who have held certain senior positions in state service "may not engage in activity as a lobbyist under AS 24.45 for a period of one year after leaving service." The identified positions include division director of a principal department in the executive branch.[12]

Under the Alaska statutes governing lobbying activity, AS 24.45, "lobbyist" means a person who (1) engages in the business or occupation of influencing legislative or administrative action, or (2) "is employed and receives payments, or who contracts for economic consideration, including reimbursement of travel and living expenses, to communicate directly or through the person's agents with any public official for the purpose of influencing legislative or administrative action for more than 10 hours in any 30-day period in one calendar year."[13] "'[I]nfluencing legislative or administrative

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9 *Id.*

10 AS 39.52.180(b).

11 AS 39.52.180(c).

12 AS 39.52.180(d).

13 AS 24.45.171(11).

action' means to communicate directly for the purpose of introducing, promoting, advocating, supporting, modifying, opposing, or delaying or seeking to do the same with respect to any legislative or administrative action."[14] '"[C]ommunicate directly' means to speak with a legislator, legislative employee, or public official . . . by telephone[,] by two-way electronic communication[,] or in person."[15] The one-year prohibition applies to lobbying of the Alaska State Legislature **and** agencies of the executive branch of the State of Alaska.[16]

The lobbying prohibition does not, however, bar you from serving as a "volunteer lobbyist" described in AS 24.45.161(a)(1).[17] A "volunteer lobbyist" is an individual "who lobbies without payment of compensation or other consideration and makes no disbursement or expenditure for or on behalf of a public official to influence legislative or administrative action other than to pay the individual's reasonable personal travel and living expenses" and "who limits lobbying activities to appearances before public sessions of the legislature, or its committees or subcommittees, or to public hearings or other public proceedings of state agencies."

The lobbying prohibition also does not preclude serving as a "representational lobbyist."[18] This type of lobbyist is "an individual who engages in lobbying activity but does not receive compensation, including any salary, fee, retainer, stipend, or other economic consideration, for the lobbying activity, except reimbursement of the individual's own travel expenses and personal living expenses incurred in lobbying activity."[19] An individual is not a representational lobbyist if the lobbying activities are on behalf of his or her employer or if, as a member of a state board or commission, the individual lobbies in an official capacity and is reimbursed for travel expenses or personal living expenses.[20]

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14 AS 24.45.171(9).

15 AS 24.45.171(4).

16 *See* AS 24.45.171(1), (9), and (10).

17 AS 39.52.180(d).

18 *Id.*

19 2 AAC 50.550(d).

20 2 AAC 50.550(d)(1) & (2).

III. BAR ON MISUSE OF INFORMATION

The Ethics Act has another provision that applies to former public officers. In addition to AS 39.52.180, you also need to consider AS 39.52.140 addressing misuse of information. It is not clear whether your work involved information that is not publicly disseminated or is confidential.

So we also remind you that AS 39.52.140(a) precludes former public officers from disclosing or using information gained in the course of, or by reason of, official state duties that could in any way result in the receipt of a benefit to the officer or an immediate family member, if the information has not been disseminated to the public. Use of such information to benefit a new employer would fall within this prohibition. Information has been disseminated to the public if it has been published in some form.[21] Information that is merely available to the public, but that has never been published, is not "disseminated."[22] The legislative history of paragraph 140(a) reflects that it was intended to address the improper use of "insider information" by public officers. The provision seeks to prevent a public officer from having a competitive advantage over members of the public as a result of information that the officer acquires in the course of official duties.

Also, AS 39.52.140(b) provides that former public officers may not disclose, without appropriate authorization, information that is confidential by law.

In conclusion, the Ethics Act permits, but does not require, a former public officer to request, in writing, an advisory opinion from the attorney general interpreting these provisions of the Act as they may apply to the former public officer. A former public officer is not liable for any action taken in accordance with written advice from the attorney general, so long as the officer had "fully disclosed all relevant facts reasonably necessary to the issuance of the advice." The legal protection afforded you does not apply if those facts are inaccurate or incomplete.

You are welcome to seek further review from this office if you have any concerns regarding the applicability of the Ethics Act to a specific post state employment matter.

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[21] Publication includes an online posting, newspaper publication, broadcast media, a press release, a newsletter, a legal notice, a non-confidential court filing, a published report, a public speech, or public testimony before the legislature, a board, or a commission. 9 AAC 52.070(a).

[22] 9 AAC 52.070(b).

You need not do so in every case. If you do make a request, we will endeavor to provide a timely response.

If you have any questions concerning this advice, please contact me.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:
Julia B. Bockmon
Senior Assistant Attorney General

JBB/nrd